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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 800

FRANK K. WEINGARTNER, ET AL.,
Petitioners,

vs.

UNION OIL COMPANY OF CALIFORNIA,
Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A) is not yet reported in F.2d but appears in 1970 Trade Cases ¶ 73, 291. The District Court's opinion is not reported but is in Appendix B to the petition and is quoted in full at p. 5 infra.

JURISDICTION

The District Court had jurisdiction under 15 U.S.C. § 15. The Court of Appeals had no jurisdiction and for that reason dismissed the appeal, because the appeal was from an interlocutory order and the District Court had refused to certify the case for an interlocutory appeal under 28 U.S.C. § 1292(b). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Petitioners sued to assert claims under Sections 1 and 2 of the Sherman Act and Section 4 of the Clayton Act, all adequately quoted in Pet. App. D. They sought to maintain the suit as a class action under F.R.Civ. Proc. Rule 23, also quoted in Pet. App. D.

The relevant portion of Rule 23, for present purposes, is sub. (c)(1):

> "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

The petition fails to quote statutes governing this appeal:

28 U.S.C. 1291

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

28 U.S.C. 1292(b)

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such an order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order: *Provided, how-*

All emphasis in quotations has been added unless otherwise noted. References to the record are indicated by the symbol "R.", references to the Petition by the symbol "Pet."

ever, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

QUESTION PRESENTED

Only one question was decided by the Court of Appeals:

Is an interlocutory order, declining to determine that "on this, the present record" an action may proceed under F.R.Civ. Proc. Rule 23 as a class action, appealable as a "final decision" under 28 U.S.C. § 1291, where the action is yet to be tried? Is it not merely an interlocutory order not appealable in the absence of a certification under 28 U.S.C. § 1292(b)?

The other "questions" stated in the petition (pp. 2, 4) are not present at all, as they relate to the issue whether the District Court's order was erroneous. That issue was never reached by the court below.

STATEMENT OF THE CASE

Most of the Statement of the petition consists of assertions about the merits of the substantive claims, although the case has not yet been tried, or of assertions relative to the propriety of a class action, although the facts were found to the contrary in the District Court and that determination was not reviewed by the court below. None of that is relevant to the only question presently involved.

A. The Proceedings Concerning a Class Action.

This action was commenced by five of the fifteen petitioners (R. 1) before new Rule 23 of the Rules of Civil Procedure was adopted in 1966. Under old Rule 23 the practice was for a plaintiff to assert his claim in one count and repeat it as a class action in another; a motion to strike the second count was the means of challenging the class aspect. That practice was followed here (R. 8, 14). While Union's motion to strike was pending,

Rule 23 was amended and thereafter the District Court denied Union's motion on the ground that (R. 359-360):

> "Proceedings have not yet reached a point where it is practicable for the Court to determine whether this action is to be maintained as a class action * * * the Court reserving until a later date the question whether this action may be so maintained."

In the interim, and also later, a number of persons moved to intervene (R. 40-56, 131-198, 296-302) and ten were granted leave to do so (R. 359), bringing the number of plaintiffs to fifteen.

Some 70 others, some of whom had been denied intervention, and still others who had not sought to intervene, all represented by petitioners' counsel, thereafter filed similar complaints in the Central District of California (Pet. 9). Still later, petitioners' counsel moved in those cases under Rule 23 to declare them maintainable as class actions (R. 657-833). Those motions were denied by the court in the Central District (R. 659).

The same counsel then filed their motion in this case for an order declaring affirmatively that it could be maintained as a class action (R. 489). At the hearing the District Court requested specific statements as to contentions and issues and a factual showing to enable it to reach a determination (Rep. Tr. of March 29, 1968, p. 48).* After all the parties had responded to this request

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*In doing so the court acted on the wise basis later articulated by the Second Circuit thus, in *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295, 298 (2 Cir. 1969):

> "The key words of Rule 23 are 'fair and efficient adjudication.' This issue should not be decided in an abstract or academic manner but rather in a practical and realistic way by a trial judge who has knowledge of the actual problems presented in the courtroom by these multi-plaintiff, multi-defendant cases. In theory and in an initial off-hand reaction, it is tempting to say: why not let everyone who asserts a somewhat related grievance come into a common arena to resolve their controversy? However, on a moment's reflection, it should be apparent that the capacities of judges and jurors to absorb the factual situations thus presented are finite and that courthouses are not coliseums."

(R. 658-808, 809-886), the court entered the following order (R. 887):

> "After reviewing the record in the instant case and the numerous affidavits submitted to the court, the court finds not only that plaintiffs have failed to establish the prerequisites of paragraphs (2), (3) and (4) of subdivision (a) of Rule 23 Federal Rules of Civil Procedure, but also that plaintiffs have failed to 'additionally' establish and the court is unable to find that questions of law or fact common to the members of the class (or more appropriately the three, six or more classes here possibly involved, depending upon the test applied in making up the separate categories) 'predominate over any questions affecting only individual members' nor can the court find 'that a class action is superior to other available methods for the fair and efficient administration of the controversy.' (Paragraph (3) of subdivision (b) of said Rule 23.)
>
> "On the present record the affidavits on file and the deposition testimony from plaintiffs in the Los Angeles cases demonstrate that as to each of the hundreds of persons whom counsel for plaintiffs would draw into litigation, there would be necessitated a *detailed* [emphasis in original] inquiry (and possibly for jury determination) of what Union did or said to him and what he did thereafter. This is the antithesis of a class action. *On this, the present record,* the court finds no basis to declare a class action and the motion therefor must be and is again denied."

Petitioners' counsel then requested a certification under 28 U.S.C. § 1292(b) to permit an interlocutory appeal from this order. Certification was denied, but counsel appealed anyway (Pet. 20). That appeal was dismissed by the court below on the ground that the order was not appealable. (Pet.App.A, p. viii). It is to review that dismissal of the appeal that petitioners now seek review by this Court.

B. The Nature of the Case and Its Background.

Inasmuch as the only question presentable to this Court is the same as on an interlocutory appeal in any case from an order

under Rule 23, the particular facts of this case are of small, if any, relevance. We review them just enough to dispel the erroneous picture of the petition.

Plaintiffs are or were service station dealers. The substantive claims asserted relate to two entirely different economic relationships utilized by Union in different periods for the marketing of gasoline. The first was a system of marketing which Union used, until April 1964, involving consignment of gasoline to its dealers. On April 20, 1964 this Court decided *Simpson v. Union Oil Co. of California,* 377 U.S. 13. On April 27, 1964, as soon as Union could obtain and digest that decision, it advised each of its dealers of what this Court had held and informed him that he was "therefore free to set the price at which you sell gasoline to the motoring public . . . ." (R. 802). Union then offered to its dealers a choice of two types of purchase and sales agreement, and all chose one or the other.

As respects the pre-April 1964 period, although petitioners' claims rest on an assumption that the consignment system was the same as that used at a still earlier period of time and involved in *Simpson,* the kind of damages claimed is different. In *Simpson* the principal claim was based on Union's refusal to continue to lease its premises to the dealer or to deal with him. No plaintiff makes that claim here; the claim is simply that each plaintiff would have made more in the sale of gasoline but for the provision of the consignment agreement respecting his sales price. That involves the predicate that the dealer observed Union's price directions; the case as to each plaintiff is controlled by the fact, individual to him, whether he paid any attention to Union's price direction or, instead, charged what he wanted when he wanted.

The claims as respects post-April 1964 differ from those pertaining to the prior time in that they rest on no unlawful agreement. Counsel so conceded in an early application in this case, as

was made clear in an opinion by the District Court reported in *Weingartner v. Union Oil Company,* 1966 Trade Cas. ¶ 71,757, at pp. 82500-01;

> "The record now is clear to the effect that plaintiff does not allege or claim that either the Retail Dealer Purchase and Storage Agreement or the Retail Dealer Purchase Contract in use by defendant since the ruling in *Simpson* are in themselves unlawful."

The claim relative to post-April 1964 is that, despite the lawfulness of his supply agreement, each plaintiff was *coerced* to adhere to resale prices. Thus the case of each dealer rests on its facts, individual to him, for any dealer's claim of being "ordered", "threatened", or "coerced" and the like must necessarily be proved by different conversations between different claimants and different members of what the complaint styles "a vast army of [Union] employees" (R. 344).

Before ruling on plaintiffs' motion to declare that the action could be maintained as a class action, the District Court called on counsel to make a factual showing of the existence of some predominant common issue. The record then made shows that there was none. Depositions had been taken of the some 70 Union Oil dealer-plaintiffs in the similar Central District cases, and about 74 pages of their testimony were introduced here by Union (R. 658-732). They demonstrated to the satisfaction of the District Court that the situation of each dealer was individual and different from that of every other. Many of these dealers testified that they had *no grievance whatever* with Union conceivably related to the allegations in their complaints.* Many testified that they had charged whatever retail prices their own business judgment dictated in the consignment period and in the

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**E.g.,* Jacobus (R. 662-63, 664); McDonald (R. 666, 667); Bilbrey (R. 676-77); Anondson (R. 670, 671); Golden (R. 689); Parker (R. 707); Bowen (R. 710).

post-consignment period,* and that there was no pressure from Union to charge any price.**

ARGUMENT

An order under F.R.Civ.P. Rule 23 determining that an action may be not maintained as a class action is always without prejudice to renewal during the progress of the case. Rule 23(c)(1) expressly provides that such an order "may be altered or amended before the decision on the merits." The Notes of the Advisory Committee on Rule 23(c)(1) state (28 U.S.C.A. Rules 17-33, 1970 Pocket Part, p. 82):

> "A determination once made can be altered or amended before decision on the merits if, upon fuller development of the facts, the original determination appears unsound."

Before the District Court could determine that the action could be maintained as a class action, the record before it would have to support findings of fact that the four "prerequisites to a class action" expressed in Rule 23(a) existed and that the "additional" tests necessary under Rule 23(b) were also present. The order appealed from specifically stated that "on this, the *present* record, the court finds no basis to declare a class action" (p. 5, supra). Counsel are free to make another record, if they can, or the court can change its mind on the present record.

Plainly, then, the District Court's order was interlocutory and not final within the meaning of 28 U.S.C. § 1291.

**E.g.*, Reisner (R. 690, 691-92, 693-94), Deach (R. 698), Jacobus (R. 661-62, R. 663-64), McDonald (R. 666), Bilbrey (R. 675-76), Anondson (R. 669), Curtis (R. 680-681, 683), LeMaster (R. 685-86), Deach (R. 695-96, 698), Jepsen (R. 700-701), Parker (R. 704-05, 705-06), Bowen (R. 709), Neal (R. 711-13), Drevlo (R. 715-16, 717), Watch (R. 719), Munsee (R. 723), Powell (R. 725-26, 727-28), Aljian (R. 731).

***E.g.*, LeMaster (R. 685-86), Bilbrey (R. 675-76), Curtis (R. 681-82), Deach (R. 695-96, 697), Jacobus (R. 661), McDonald (R. 666), Anondson (R. 669), Reisner (R. 690-91), Jepsen (R. 700-01), Parker (R. 704, 707-08), Bowen (R. 709-10), Drevlo (R. 715-16), Watch (R. 718-19), Munsee (R. 723, 724-25), Powell (R. 725-26).

On this question the Circuits are in accord. The Second Circuit accords with the court below that an order during the course of the case determining that an action may not be maintained as a class action is not appealable. *City of New York v. International Pipe & Ceramics Corp.*, 410 F.2d 295 (2 Cir. 1969); *Caceres v. International Air Transport Ass'n.*, 422 F.2d 141 (2 Cir. 1970) (both antitrust cases).

In the Seventh Circuit an appeal from an order under new Rule 23 adverse to a class action has been permitted only as an interlocutory appeal where taken under the interlocutory appeal procedure of 28 U.S.C. § 1292(b). *Hohmann v. Packard Instrument Co.*, 399 F.2d 711 (7 Cir. 1968). Plaintiffs unsuccessfully tried to utilize that procedure in the present case, but certification under § 1292(b) was denied by the District Court.

The question of appealability of an order adverse to class action under new Rule 23, as a "final" order under § 1291, has not arisen in other circuits. But under former Rule 23 it was uniformly held that an order striking the averments of a class action but permitting the action to continue as to the named plaintiffs is not appealable. E.g., *All American Airways v. Eldred*, 209 F.2d 247, 249 (2 Cir. 1954); *Lipsett v. United States*, 359 F.2d 956 (2 Cir. 1966); *Jumps v. Leverone*, 150 F.2d 876 (7 Cir. 1945); *Rogers v. Alaska S.S. Co.*, 249 F.2d 646, 650 (9 Cir. 1957).* The amendment to Rule 23 could not have altered this principle, for to do so would expand the jurisdiction granted to the Courts of Appeals by 28 U.S.C. § 1291, contrary to Rule 82. In *Snyder v. Harris*, 394 U.S. 332 (1969), this Court held that new Rule 23 could not enlarge jurisdiction and therefore did not permit aggregation of the claims of class members in determining

Harris v. Palm Springs Alpine Estates, Inc., 329 F.2d 909 (9 Cir. 1964) and *Knuth v. Erie-Crawford Dairy Co-op Ass'n.*, 395 F.2d 420 (3 Cir. 1968), cited by petitioners, are not contrary. In both the District Court dismissed not merely the class action count but the whole case so that the appeal was by the named plaintiffs from a final order dismissing their suits in entirety.

diversity jurisdiction. These principles about non-enlargement of jurisdiction necessarily apply as much to jurisdiction of the appellate courts as to jurisdiction of the district courts.

An order denying maintenance as a class action is analogous to orders denying permissive intervention or consolidation, neither of which is appealable. *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 529 (1947); *Nolfi v. Chrysler Corp.*, 324 F.2d 373 (3 Cir. 1963).

In an effort to escape the interlocutory nature of the order appealed from, counsel postulates the existence of service station dealers who will die or become bankrupt or whose addresses will, inexplicably, be "lost", and asserts, as to these postulated persons, that the order appealed has terminated their claims (Pet. 23, 24). This argument founders in fact and in law, for several reasons.

The first obvious truth is that deaths or bankruptcies do not terminate antitrust claims, for the claims pass to personal representatives of the deceased or to the trustee in bankruptcy. *Hicks v. Bekins Moving & Storage Co.*, 87 F.2d 583 (9 Cir. 1937); *Moore v. Backus*, 78 F.2d 571 (7 Cir. 1935); *Fazakerly v. E. Kahn's Sons Co.*, 75 F.2d 110, 114 (5 Cir. 1935).

In the second place, the persons whose claims are postulated as existing and terminated are not those here appealing. Nothing is more elementary than the principle that only a person aggrieved by an order may appeal from it. *Parr v. United States*, 351 U.S. 513, 516 (1956); *Tileston v. Ullman*, 318 U.S. 44 (1943); *Davis v. Preston*, 280 U.S. 406 (1930); *Lewis v. United States*, 216 U.S. 611 (1910).* The order here appealed from does not adjudicate any claim which any of the petitioners asserts on his own

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*To the same effect: *United States v. Adamant Co.*, 197 F.2d 1, 5 (9 Cir. 1952), cert.den. *sub nom. Bullen v. Scoville*, 344 U.S. 903 (1952); *Webb v. Beverly Hills Federal Savings & Loan Association*, 364 F.2d 146, 149 (9 Cir. 1966); *United States v. Shelley*, 218 F.2d 157, 158 (2 Cir. 1954); *Milgram v. Loew's, Inc.*, 192 F.2d 579, 586 (3 Cir. 1951), cert. den. 343 U.S. 929; *Tri-State Corporation v. Alabama*, 370 F.2d 544, 545 (5 Cir. 1967); *Fuqua v. Bidwell*, 281 F.2d 753, 754 (6 Cir. 1960).

behalf. Their claims to recover under the Clayton Act still remain pending below, awaiting trial and adjudication. It is not the petitioners who are aggrieved by an order that alleged claims of others are not to be involved in this action. No plaintiff would have had standing to appeal from an order denying leave to a non-party to intervene as a plaintiff in the case. Indeed the order appealed from did not even prevent the supposed unnamed members of the class from bringing their own actions and thus left them in the same position they would have been in if they had unsuccessfully moved to intervene. Yet it is settled that an order denying permissive intervention is not appealable, even by the party seeking to intervene. *Brotherhood of Railroad Trainmen v. Baltimore & Ohio R. Co.*, 331 U.S. 519, 524 (1947):

> "The permissive nature of such intervention necessarily implies that, if intervention is denied, the applicant is not legally bound or prejudiced by any judgment that might be entered in the case. He is at liberty to assert and protect his interests in some more appropriate proceeding. Having no adverse effect upon the applicant, the order denying intervention accordingly falls below the level of appealability."

In simple truth, although the motion to declare a class action was purportedly made by the plaintiffs, their names were conscripted for the purpose as they are now conscripted as petitioners; none of them has any real interest in it; the real parties in interest on whose behalf the motion was made and the appeal taken are petitioners' counsel.

The necessity that the parties appealing be aggrieved in order to appeal is illustrated by two other Second Circuit cases in which, for unusual circumstances, a class action order was held appealable, *Eisen v. Carlisle & Jacquelin*, 370 F.2d 119 (2 Cir. 1966), cert. den. 386 U.S. 1035, and *Green v. Wolf Corp.*, 406 F.2d 291 (2 Cir. 1968). In the later cases of *City of New York v. International Pipe & Ceramics Corp.* 410 F.2d 295 (2 Cir. 1969) and *Caceres v. International Air Transport Assn.*, 422 F.2d 141 (2 Cir.

1970), these two cases were distinguished as turning on the exceptional factual situation that in both there was but one named plaintiff whose own claim was so small ($70.00 in *Eisen*) that no competent attorney would prosecute a claim for so little. Therefore the determination adverse to a class action was the "death knell" of the named plainiff's own case and was tantamount to a dismissal of *his* claim. Here the facts are widely different; the 15 named plaintiffs assert claims in excess of $117,900 before trebling, or $353,700. Petitioners do not even assert that the "death knell" theory is applicable, and the court below was "not convinced by any representation made to [it] by plaintiffs that they lack the economic ability to finance their part of this lawsuit" (Pet. App. A., p. viii). Antitrust litigation is often prosecuted by service station dealers acting on their own behalf and without the benefit of class actions.*

In the third place, there is no basis to assume that anybody who has a grievance has failed to present it. Within the first year counsel sought intervention for some 49 other persons, and they either did intervene or filed suits in Los Angeles. Counsel later filed still other cases in the Central District of California for other persons to an aggregate of another 34. Plainly, Union's dealers were canvassed to join the litigation and all those who wished to assert claims did so by suing. The effort to maintain a class action

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*As noted, five other cases identical to the present are proceeding in Los Angeles. Other examples of such litigation are *Lessig v. Tidewater Oil Co.*, 327 F.2d 459 (9 Cir. 1964), cert. den. 377 U.S. 993; *Simpson v. Union Oil Company*, 377 U.S. 13 (1964); 396 U.S. 13 (1969); *Standard Oil Co. v. Moore*, 251 F.2d 188 (9 Cir. 1957), cert. den. 356 U.S. 975; *Quinn v. Mobil Oil Co.*, 375 F.2d 273 (1 Cir. 1967), cert. dismissed 389 U.S. 801; *Guidry v. Continental Oil Co.*, 350 F.2d 342 (5 Cir. 1965); *Osborne v. Sinclair Refining Co.*, 286 F.2d 832 (4 Cir. 1960), cert. den. 366 U.S. 963; *Alexander v. Texas Co.*, 165 F.Supp. 53 (W.D. La. 1958); *Brenner v. Texas Co.*, 140 F.Supp. 240 (N.D. Cal. 1956); *Myers v. Shell Oil Co.*, 96 F.Supp. 670 (S.D. Cal. 1951); *Spencer v. Sun Oil Co.*, 94 F.Supp. 408 (D. Conn. 1950); *Broussard v. Socony Mobil Oil Co.*, 350 F.2d 346 (5 Cir. 1965); *Munson v. Richfield Oil Corp.*, 91 F.Supp. 171 (S.D. Cal. 1950).

was an effort to embroil still others in litigation in which they had no desire to participate.

The non-appealable nature of the order is demonstrable by another consideration. If the so-called members of the class had been named plaintiffs and if the order had adjudicated that they had no rights on the merits, leaving the claims of the 15 petitioners unadjudicated, as they are unadjudicated here, the order would not be appealable, because a final judgment as to fewer than all claims or parties can be entered "only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment" R.C.P. 54(b). As otherwise the order "is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties" (Rule 54(b)), it is not appealable. *Partin v. Hassan Motors, Inc.*, 363 F.2d 104 (6 Cir. 1966).

Counsel's reliance on *Gillespie v. United States Steel Corp.*, 379 U.S. 148 (1964) is unfounded. There the District Court made an order adjudicating that there could be no recovery by an administratrix for the benefit of a brother and sisters of a decedent for whose death the administratrix was suing. The order appealed from "effectively cut off" the claims and thus gave "ample reason to view their claims as severable in deciding the issue of finality, particularly since the brother and sisters were separate parties in the petition [to the Court of Appeals] for extraordinary relief." 379 U.S. at 153. Here, the trial court has made no adjudication about the merits of anybody's claim, and no dealer unnamed as a plaintiff appealed to the court below for any relief for which it has petitioned this Court.

It is no great feat to imagine inconveniences, as counsel does, consequent on holding interlocutory orders unappealable. As stated in *Borden Company v. Sylk*, 410 F.2d 843, 846 (3 Cir. 1969):

> "Every interlocutory order involves, to some degree, a potential loss. That risk, however, must be balanced against

> the need for efficient federal judicial administration as evidenced by the Congressional prohibition of piecemeal litigation. To accept the appellant's view is to invite the inundation of appellate dockets with what have heretofore been regarded as nonappealable matters * * * [and], is also ready to invite a geometrical increase in the already unacceptable delay between the date of filing and trial in the metropolitan district courts."

By enacting the interlocutory appeal procedure of 28 U.S.C. § 1292(b), Congress gave as much weight to the arguments in favor of interlocutory appeals as it concluded they deserved. By § 1292(b) it limited the power of the Courts of Appeals to entertain interlocutory appeals. The present order is not included.

CONCLUSION

In *Goldstein v. Cox,* 396 U.S. 471, 478 (1970), this Court said:

> "* * * In the absence of clear and explicit authorization by Congress, piecemeal appellate review is not favored, [cit. omitted] and this Court above all others must limit its review of interlocutory orders."

It is respectfully submitted that there is no shred of merit in the petition. It should be denied.

Dated: San Francisco, California, October 29th, 1970.

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